

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSE LOPEZ TORRES, ALVIN GAITAN
BENITEZ, CHRISTIAN LEMUS CERNA,
OMAR DEJESUS CASTILLO, MANUEL
ERNESTO PAIZ GUEVARA, and
JESUS ALEJANDRO CHAVEZ,

Defendants.

Crim. No. 1:14cr306

May 3, 2016

JURY TRIAL

BEFORE: THE HONORABLE GERALD BRUCE LEE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR GOVERNMENT: UNITED STATES ATTORNEY'S OFFICE
BY: JULIA MARTINEZ, AUSA
TOBIAS TOBLER, AUSA

OFFICIAL COURT REPORTER:

RENECIA A. SMITH-WILSON, RMR, CRR
U.S. District Court
401 Courthouse Square, 5th Floor
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1 APPEARANCES (Continued)

2 FOR DEFENDANT JOSE LOPEZ TORRES

3 BYNUM & JENKINS, PLLC
4 BY: ROBERT L. JENKINS, JR., ESQ.

5 FOR DEFENDANT ALVIN GAITAN BENITEZ

6 LAW OFFICE OF AMY LEIGH AUSTIN
7 BY: AMY LEIGH AUSTIN, ESQ.
8 SMITH & ZIMMERMAN, PLLC
9 BY: JEFFREY D. ZIMMERMAN, ESQ.

10 FOR DEFENDANT CHRISTIAN LEMUS CERNA

11 LAW OFFICE OF CHRISTOPHER AMOLSCH
12 BY: CHRISTOPHER AMOLSCH, ESQ.

13 FOR DEFENDANT OMAR DEJESUS CASTILLO
14 OLD TOWN ADVOCATES, PC
15 BY: MEREDITH M. RALLS, ESQ.

16 FOR DEFENDANT MANUEL ERNESTO PAIZ GUEVARA

17 LAW OFFICE OF W. MICHAEL CHICK, JR.
18 BY: WILLIAM MICHAEL CHICK, JR., ESQ.

19 FOR DEFENDANT JESUS ALEJANDRO CHAVEZ

20 JEROME P. AQUINO, ESQ.
21 ELITA C. AMATO, ESQ.

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24
25

1 (Thereupon, the following was heard in open
2 court at 11:08 a.m.)

3 THE CLERK: 1:14 criminal 306, United States
4 versus Jose Lopez Torres, Alvin Gaitan Benitez,
5 Christian Lemus Cerna, Omar DeJesus Castillo, Manuel
6 Ernesto Paiz Guevara, and Jesus Alejandro Chavez, with
7 three Spanish interpreters.

8 THE COURT: Good morning, Ms. Eva
9 Desrosiers, Ms. Maria Horvath and Ms. Anna Lefèvre.
10 Will each of you act as interpreters for us
11 today?

12 THE INTERPRETERS: Yes, Your Honor.

13 THE COURT: If you would take the oath from
14 the clerk, please.

15 (Interpreters duly sworn.)

16 THE INTERPRETER: I do, for the record, Ana
17 Lorena Lefèvre, federally certified court interpreter.

18 THE INTERPRETER: Maria Horvath, federally
19 certified interpreter.

20 THE INTERPRETER: Eva Desrosiers, federally
21 certified Spanish interpreter.

22 THE COURT: All right.

23 Counsel, if you would all enter your
24 appearances, please.

25 MS. MARTINEZ: Good morning, Your Honor.

1 Julia Martinez and Tobias Tobler on behalf of the United
2 States.

3 THE COURT: Good morning.

4 MS. MARTINEZ: Good morning.

5 MR. AQUINO: Good morning, Your Honor.

6 Jerry Aquino and Elita Amato on behalf of Mr. Chavez.

7 THE COURT: Good morning.

8 MS. AUSTIN: Good morning, Your Honor. Amy
9 Austin and Jeffrey Zimmerman on behalf of Alvin Gaitan
10 Benitez.

11 THE COURT: Good morning.

12 MS. RALLS: Good morning, Your Honor.

13 Meredith Ralls on behalf of Omar DeJesus Castillo.

14 THE COURT: Good morning.

15 MR. CHICK: Good morning, Your Honor. Mike
16 Chick on behalf of Manuel Ernesto Paiz Guevara.

17 THE COURT: Good morning.

18 MR. JENKINS: Good morning, Your Honor. May
19 it please the Court, Robert Jenkins on behalf of
20 Mr. Lopez Torres.

21 THE COURT: All right, good morning.

22 MR. AMOLSCH: Good morning, Your Honor.
23 Christopher Amolsch for Mr. Cerna who is present.

24 THE COURT: Good morning, Mr. Jose Lopez
25 Torres.

1 Good morning.

2 Good morning, Mr. Alvin Gaitan Benitez, good
3 morning.

4 Good morning, Mr. Christian Lemus Cerna,
5 good morning.

6 Mr. Manuel Ernesto Paiz Guevara, good
7 morning.

8 And Mr. Jesus Alejandro Chavez, good
9 morning.

10 All right, counsel, I'm ready to proceed.

11 MR. AQUINO: Good morning, Judge. We're
12 here on our Rule 33 motion. Just as a preface to that
13 motion, a couple matters.

14 One, my sense is that in your life as a
15 federal and state judge you probably have not granted
16 this motion more than twice, maybe tops, maybe less.

17 The idea of granting a new trial to
18 Mr. Chavez is not something that causes you to jump for
19 joy. We understand that, but we submit that you should
20 grant this motion of Mr. Chavez for reasons that we
21 cited in the papers independently, that is, standing
22 alone as well as jointly.

23 The law in this subject is crystal clear.
24 Pursuant to Rule 33, the Court has the power to review
25 the entire record that has taken place in the case, to

1 include examining the credibility of witnesses, or to
2 say this is a different way, this is not a renewed Rule
3 29 motion. This is -- we're here under Rule 33.

4 So, the only question is, would you exercise
5 that power in this case, and we ask that you do so for a
6 number of reasons.

7 The first deals with the question of
8 spillover evidence, of which there was a significant
9 amount. And in that regard, we'd like to cite two cases
10 to you, the *McRae* case from the Fifth Circuit in 2012
11 and Judge Brinkema's decision in this court in August of
12 2014 in *United States versus Aleem*. Both of those cases
13 were cited in our pleadings.

14 *McRae*, we submit, is a highly significant
15 case for a couple reasons. And I would just like to
16 read a few sentences from that decision.

17 THE COURT: I hope that you won't read to
18 me, Mr. Aquino, because you should assume I've read your
19 brief.

20 MR. AQUINO: Well --

21 THE COURT: I have a couple questions,
22 though.

23 MR. AQUINO: Sure.

24 THE COURT: The first is, this is a
25 conspiracy case involving racketeering; is that right?

1 MR. AQUINO: Understood.

2 THE COURT: And so is there always spillover
3 when there're cases like that? There is always
4 different levels of evidence against individuals, some
5 higher, some lower, some not at all; is that right?

6 MR. AQUINO: Understood. What separates
7 this case and what makes this more like the *McRae* case,
8 as well as the *Aleem* case -- *Aleem*, by the way, was a
9 racketeering conspiracy case.

10 THE COURT: Was it MS-13?

11 MR. AQUINO: It was African American gang.
12 Just substitute African American for Hispanic and it's
13 basically the same case. There were not murders but
14 there was very serious attacks in that case, to include
15 face slashings, rapes, as well as an incredible amount
16 of sex trafficking and terrible telephone calls involved
17 in the *Aleem* case.

18 THE COURT: So the *Aleem* case was Judge
19 Brinkema, not the Fourth Circuit?

20 MR. AQUINO: Not the Fourth Circuit, Judge
21 Brinkema.

22 THE COURT: Uh-huh.

23 MR. AQUINO: In -- let's go from starting
24 with *McRae*.

25 *McRae*, really, cites the law in our circuit

1 on the issue of severance. And that's why I wanted to
2 draw your attention to it. It goes on to say very
3 briefly, "Our case law does not" -- they're talking
4 about the Fifth Circuit case law -- "reflect a liberal
5 attitude towards severance. We will not reverse a
6 conviction based upon a denial of a motion to severe,
7 unless the defendant can demonstrate compelling
8 prejudice against which the trial court was unable to
9 afford protection, in that he was unable to obtain a
10 fair trial". That's our law. That's Fourth Circuit law
11 and any judge of the circuit -- of our circuit could
12 have written those words.

13 Now, the Court in that case, however, did
14 reverse, and they went on to make this finding which is
15 applicable to our facts. "The most compelling prejudice
16 in our mind resulted from the evidence, testimony and
17 photographs presented in connection with the
18 government's case against *McRae* for the burning of
19 Glover's body".

20 Just as an aside, this was a Hurricane
21 Katrina case in which three police officers were charged
22 with shooting and -- one of them was charged with
23 shooting and killing a Mr. Glover. And the other two
24 police officers for a coverup in that death.

25 The Court goes on to say "all of this

1 evidence had the effect of associating Warren" -- that's
2 one of the police officers -- "with the burning of
3 Glover's body and subsequent coverup. Especially
4 troubling were the photographs of Glover's remains after
5 they had been burned and the emotional testimony of
6 Glover's family".

7 This case is well beyond that case, well
8 beyond it. What do we have in this case that makes it
9 even worse than *McRae*? In this case, the government
10 introduced a significant number of photos of bodies that
11 had been buried and reburied.

12 For example, in 88A, I believe, is the
13 picture of Lagrima's decomposed body. In Exhibits 90A
14 and 90B are picture of Mr. Gerson's body.

15 Now all of us in this courtroom have been
16 around the block and we've seen some terrible pictures.
17 Sometimes in our business we see people at their worst.

18 And I have to tell you in all honesty,
19 pictures 90A and 90B were some of the most gruesome
20 pictures I've ever seen involving Mr. Gerson.

21 THE COURT: Wasn't your client in jail when
22 all this happened?

23 MR. AQUINO: Absolutely. In fact, there was
24 a stipulation that he was in jail at the time all this
25 happened and that's my point.

1 THE COURT: I had the impression that your
2 defense at trial was eyewitness identification. Your
3 guy didn't do it.

4 MR. AQUINO: That's right. But the issue
5 I'm dealing with now is the spillover of having to sit
6 in court where all this evidence poured in on him that
7 was unrelated to him, that was totally unconnected to
8 Mr. Chavez.

9 And that's what the Court found in *McRae*.
10 And that's what I submit, bothered Judge Brinkema in
11 exactly the same issue in the *Aleem* case.

12 *Aleem*, like this, I cited a number of
13 factors in front of Judge Brinkema, but the predominant
14 factor was spillover as in *McRae*, the Fifth Circuit
15 decided upon.

16 In this case, we have it in spades. Not
17 only do we have these horrible pictures that came into
18 evidence, we have a heavy dose of drug trafficking, sex
19 trafficking, as well as some really terrible telephone
20 calls that again were unconnected to Mr. Chavez.

21 THE COURT: But this is not a state court
22 conspiracy case. This is a RICO case.

23 MR. AQUINO: I understand that --

24 THE COURT: We both can't talk at the same
25 time. I'll let you speak if you let me speak.

1 MR. AQUINO: Yes, sir.

2 THE COURT: My impression is that because
3 the government has to show predicate acts that a lot of
4 the evidence was offered for those reasons. Do you
5 disagree with that?

6 MR. AQUINO: I do not disagree with that,
7 but what I would say is this, that in a separate trial,
8 much of this evidence would be unlikely, unlikely to
9 come into evidence against Mr. Chavez.

10 For example, I don't dispute the
11 government's right to put on evidence of deaths, for
12 example. But I submit to you that the gruesome
13 photographs that came into evidence would not be
14 admissible in a trial against him solely. Or --

15 THE COURT: Are you familiar with a single
16 defendant going to trial on a RICO case, Mr. Aquino?

17 MR. AQUINO: I am not --

18 THE COURT: So, if this were a state court
19 murder case, maybe what you're saying is true. But this
20 is not a state court murder case, is it?

21 MR. AQUINO: It is not a state court murder
22 case, but it doesn't separate the fact that evidence
23 that was against him that was unconnected to him, poured
24 into evidence that I submit was damaging to Mr. Chavez.

25 And, for example in this case that I cited

1 in *McRae*, *McRae* was cited with two other gentlemen, two
2 other police officers at the time. And the Court went
3 on to make that finding.

4 Some of the evidence and testimony would
5 have been inadmissibility against Warren. Again, that's
6 the police officer Warren, the moving party, had he been
7 tried alone.

8 And we are convinced that the severely
9 emotional testimony and photographs prejudiced Warren.
10 I submit that's exactly what Mr. -- prejudiced that
11 Mr. Chavez suffered in this case.

12 Keep in mind, the government also made a lot
13 of noise over telephone calls and recordings. And they
14 cited these specific telephone -- recordings that they
15 made a big point about, the government. This is, for
16 example, concerning Mr. Alvin Gaitan Benitez. "I was
17 calm with a knife in my hand. When he's through, they
18 knock him down, whomp, right then and there I ripped his
19 coconut off".

20 The government also put on evidence --

21 THE COURT: Your guy was in jail when all
22 that happened, right?

23 MR. AQUINO: Absolutely.

24 THE COURT: So, I read your brief. I get
25 that part. I understand that.

1 MR. AQUINO: And so, my point is, is that
2 none of this evidence is connected to Mr. Chavez. For
3 example, as in the *Aleem* case, *Aleem* case, again was a
4 gang racketeering case in which Mr. Aleem was being
5 tried with a number of other people. None of the
6 evidence concerning the rapes, concerning the severe
7 assaults, really horrible assaults -- there was a young
8 woman whose face was slashed from here to here. The
9 government made a big point of that, put on pictures of
10 her as well as had her get off the jury -- excuse me,
11 the witness stand, and parade up and down in front of
12 the jury.

13 And the troubling aspect of that is that is
14 highly emotional testimony as were the photographs of
15 Lagrima and Gerson in this case.

16 THE COURT: I agree with you that when hear
17 testimony that somebody's head was cut off and buried in
18 the ground, but that's what happened. We can't sanitize
19 what happened. That's what happened.

20 Now as it relates to your client, your
21 client was in jail. So --

22 MR. AQUINO: Well --

23 THE COURT: -- he had an airtight alibi for
24 all those things.

25 MR. AQUINO: In a technical sense, that's

1 true. The problem is, is that the evidence spilled over
2 as in *McRae*, as in *Aleem*, onto him from which he could
3 not be protected by limiting instructions.

4 For example, in -- for example, in *McRae*,
5 the Court goes on to find --

6 THE COURT: Please, please, don't read the
7 case to me.

8 MR. AQUINO: I won't.

9 THE COURT: Thank you.

10 MR. AQUINO: The Court goes on to find in
11 that case, though, that limiting instructions were
12 insufficient, insufficient to protect Warren from the
13 spillover that took place.

14 THE COURT: I see part of your argument
15 being that the Fourth Circuit law should change
16 concerning instructions in multi-defendant trials and
17 that empirical researches reveal that jurors don't
18 follow instructions. And so, I understand you're making
19 a record for that, and I appreciate that.

20 MR. AQUINO: I'll move on to my next point.

21 THE COURT: Thank you.

22 MR. AQUINO: I'm now dealing with the
23 question of Mr. Torres's mid trial plea which I
24 considered to be very significant, and I've not seen
25 such a set of facts that occurred in my 30 years of

1 practice.

2 THE COURT: Was it a guilty plea?

3 MR. AQUINO: I submit that it was. He
4 acknowledged that he committed the crime charged, I
5 believe, in Count 4 which was one of the murders that
6 were alleged against him in this case.

7 THE COURT: Now, was there a question of
8 fact for the jury to decide whether he was guilty or not
9 guilty, Mr. Aquino?

10 MR. AQUINO: Sure, absolutely.

11 THE COURT: Okay.

12 MR. AQUINO: Here's the problem I have with
13 that issue, though, is, his counsel in this case,
14 started with a very, very strong opening statement
15 followed by supremely aggressive questioning by
16 Mr. Jenkins. They were sincere in their presentation to
17 the jury. But, that makes it worse for Mr. Chavez not
18 better.

19 We proceed then five weeks, and after five
20 weeks, they turn around and say to the jury -- and this
21 is not a criticism of Mr. Jenkins or Mr. Leiva. They
22 did what their client asked them to do. They turned
23 around and said, "we were wrong. He's guilty of that
24 one count".

25 We submit this is kind of the reverse side

1 of the spillover issue that I just argued in front of
2 you which is that it diminishes our credibility and in
3 front of a jury, let's face it, credibility is
4 everything. But it damaged us in that here we were
5 essentially making the exact same argument. We didn't
6 do it. We didn't do it. And for five weeks, they
7 aggressively took that position, "we didn't do it".

8 And then all of a sudden they turned around
9 and said, "you know, we're just wrong. We did do it".
10 We submit that that is harmful to Mr. Chavez to have to
11 endure that and be associated with that after they took
12 the exact same position that we took. And we had no
13 reason to anticipate that that was going to occur.

14 The other issue, moving on to the next issue
15 in this case, which deals with the weight of the
16 evidence, which we submit bears strongly, strongly
17 against the jury verdict in this case.

18 Now, earlier you mentioned what our defense
19 was. And in part, for sure, it dealt with the
20 identification issue. There's no doubt about the
21 testimony that we heard, that Vidal Jimenez told
22 Detective Buckley that within two hours of the shooting
23 he gave this report, that the shooter had tattoos on
24 both of his forearms. That testimony was unmistakable,
25 unimpeached.

1 In addition you heard from Detective Betts
2 that established that my client, Mr. Chavez, had no
3 tattoos on his forearms.

4 Beyond that, there was the whole issue about
5 the Gatuso identification. Now, you heard testimony
6 from Sen Genaro Garcia whose nickname was Gatuso. And
7 in court there were two attempted identifications that
8 took place in the court. And on each of those
9 instances, he identified the wrong person.

10 The government tried to pass that off to the
11 jury and saying, "well, it's been two years, two years
12 from the shooting that occurred in this case". That's
13 not entirely true and that was not the evidence.

14 Within 60 days of the shooting, Gatuso was
15 presented a photo spread by Detective Victor Ignacio.
16 He was unable to make the identification of Mr. Chavez
17 as being the shooter in that case. And don't forget,
18 that's what's caused Ignacio to put his thumb on the
19 scale and try to steer Gatuso in his selection of who to
20 take out from that photo.

21 The point I'm making about these witnesses,
22 we have three potential or alleged eyewitnesses in this
23 case. Vidal Jimenez who identified the shooter has
24 having tattoos on both forearms when my client clearly
25 does not; Gatuso who was up at the plate three times in

1 the identification process, the first within 60 days of
2 the shooting and twice in this courtroom, and on each
3 attempt of identification, struck out.

4 THE COURT: This sounds like the argument
5 you made to the jury.

6 MR. AQUINO: Well it may be, but the Court
7 has the power --

8 THE COURT: It was a question of the fact
9 for the jury to decide about the accuracy of the
10 identification as well as the credibility of all the
11 witnesses who testified about the event; is that right?

12 MR. AQUINO: That is right, but you -- under
13 Rule 33, the Fourth Circuit, empowers you, empowers you
14 to consider the issue of credibility.

15 No doubt about that. Every circuit court in
16 our country does that. Under Rule 33, the Court has the
17 power to consider credibility and if there is sufficient
18 facts that weigh heavily against the jury verdict, the
19 Court has a right to -- to issue a decision granting a
20 new trial. And we submit that you should on this
21 standing alone as well as in combination with the other
22 factors that I've cited in this case.

23 THE COURT: All right.

24 MR. AQUINO: So again, of three people, of
25 three people, two gave evidence that really, I submit,

1 was inconsistent with my client's guilt. And then we
2 have the third, and that is Jose Del Cid also known as
3 Duende. Undoubtedly, he made an identification in court
4 of Mr. Chavez as the shooter.

5 But in that regard, again, the Court also
6 has the power again to consider credibility relative to
7 Del Cid. We know -- what do we know about Del Cid? Del
8 Cid has tattoos on his arms and he is an extremely, an
9 extremely violent man, such that he attempted to shoot
10 his mother when he was young.

11 What else do we know --

12 THE COURT: That was very powerful for me as
13 well.

14 MR. AQUINO: I'm sorry.

15 THE COURT: That was very powerful to me,
16 that testimony, as I'm sure it was to the jury.

17 MR. AQUINO: Understood. But, I would go
18 further, which is, he had every reason in this case not
19 to tell the truth, not to tell the truth, and is not
20 worthy of belief in this case.

21 He had every reason in the world to want to
22 shift the blame. For example, you heard Junior, the
23 government's described him as a hero, testify that there
24 was -- this was a problem shooting. And that Del Cid
25 had some answering to do for the shooting.

1 My client, Mr. Chavez, according to Junior,
2 was not a gang member, a *paro* or a *chequeo*. In other
3 words, he was an easy fall guy for Del Cid to push the
4 blame off for this unauthorized shooting of an MS-13
5 members -- of an MS-13 member, excuse me. So again, I
6 want to focus on that.

7 There's only three people who claimed to be
8 present when the shooting took place, and two out of the
9 three, I submit, gave evidence that was inconsistent
10 with my client's guilt. And a third, Del Cid, had a
11 reason to blame him for that shooting. So I'm asking
12 the Court to consider that.

13 THE COURT: All right.

14 MR. AQUINO: In addition to that, is the
15 issue with a video testimony of Cosmo -- Cosmo Gonzales,
16 who had absolutely no motive, no reason to fabricate a
17 story. His testimony was unimpeached.

18 THE COURT: Mr. Aquino.

19 MR. AQUINO: Yes, sir.

20 THE COURT: If I were to pull up the
21 transcript of your closing argument to the juror, would
22 I hear everything you're saying right now?

23 MR. AQUINO: Understood. I'll move on,
24 Judge.

25 Then we go to the issue of Detective

1 Ignacio, who I submit in this case, in a word is
2 radioactive, radioactive.

3 THE COURT: Tell me the issue as it relates
4 to Detective Ignacio that you're trying to raise, the
5 legal question. What is the legal question?

6 MR. AQUINO: Sure, that his testimony in
7 this case, as well as facts that we know about him, that
8 occurred, for example, after the trial in this case
9 about information that came to light, undermined
10 confidence in the jury verdict in this case.

11 So, what do we know about the detective? We
12 know that he interviewed three highly relevant
13 witnesses: Duende, Gatuso, and Vidal Jimenez.

14 We know that he attempted by his own
15 admission, by his own admission, attempted to steer
16 Gatuso into selecting Mr. Chavez from a photo spread
17 after Gatuso, that is Sen Genaro Garcia, was unable to
18 identify Chavez as the shooter of Mr. Urrutia.

19 Now, I consider this a pretty serious
20 matter. But to underline the seriousness of the Court,
21 I ask the Court to consider the witness tampering
22 statute in this which is specifically 18 USC 1512.

23 My client was charged by criminal complaint
24 on or about August 6th of 2014. So we have a pending
25 proceedings. Within about a week of that time,

1 Detective Ignacio attempts to steer the identification
2 of Gatuso into getting him to select our man. The
3 defendant admitted that on the witness stand.

4 The witness tampering statute says in part,
5 "whoever corruptly, otherwise obstructs, influences or"
6 apiece -- "impedes any official proceedings or attempts
7 to do so shall be fined under this title or imprisoned
8 not more than 20 years, or both".

9 Now, I'm not bringing this to your attention
10 with the hope that the government's going to do anything
11 about it, just the opposite. I'm bringing it to your
12 attention to underline the seriousness of what that
13 police officer admitted on the witness stand that he
14 attempted to do, which was to steer the identification
15 of Mr. Chavez by Gatuso.

16 THE COURT: But he didn't steer it, did it?

17 MR. AQUINO: Say again.

18 THE COURT: He didn't steer it, did he? He
19 didn't change his identification, did he?

20 MR. AQUINO: No. There was no testimony as
21 to whether the identification changed. I think in
22 actual life he did.

23 In other words, he was not able to identify
24 Mr. Chavez from the photo spread.

25 THE COURT: Well --

1 MR. AQUINO: I'm sorry, go ahead.

2 THE COURT: I guess what my concern is,
3 you're asking me now post trial to look at things that
4 happened post trial, post verdict about Detective
5 Ignacio. Is he still on the force?

6 MR. AQUINO: He is.

7 THE COURT: Has he been charged with any
8 offense?

9 MR. AQUINO: He has not that I know of and I
10 don't expect that he will be.

11 THE COURT: He's never been charged with
12 perjury, obstruction of justice; is that right?

13 MR. AQUINO: He's been charged and pled
14 guilty to a crime involving moral turpitude that he
15 admitted in court that we know about that took place as
16 a police officer.

17 THE COURT: So then that was before the
18 jury?

19 MR. AQUINO: It was before the jury.

20 THE COURT: All right.

21 MR. AQUINO: On the issue about the steering
22 of the identification process, that likewise, was before
23 the jury, in which --

24 THE COURT: There's nothing new here. These
25 are the same things you told the jury.

1 MR. AQUINO: That issue is right. I was
2 simply trying to sum up the issue of what we know about
3 him.

4 THE COURT: Okay. If you would sum up your
5 arguments, that would be great for me.

6 MR. AQUINO: Yes, sir.

7 What do we know that has taken place since
8 the jury verdict in this case? I submit it as part of
9 our pleading, an issue that took place in the City of
10 Alexandria, a defense motion for a *Brady* violation was
11 filed in front of Judge Kemler on February 29th. Keep
12 in mind, our trial started about three weeks later on
13 March 21st.

14 In that case -- and I attach the pleadings,
15 both the defense motions as well as the response by the
16 Commonwealth, as well as Judge Kemler's order, in which
17 the defense alleged that Detective Ignacio was at the
18 center of a *Brady* violation. That is, specifically --
19 there was -- the case is *Commonwealth versus Garay*.

20 And in that case, the Commonwealth was
21 alleging that Mr. Garay shot an MS-13 member. The
22 defense came after the trial into information to suggest
23 that Detective Ignacio had information that indicated
24 that Mr. Garay was not the shooter and that he was
25 pressuring a witness to testify.

1 The Commonwealth's response to that motion
2 was we, the Commonwealth, meaning the specific
3 prosecutors, did not have this information. We did not
4 engage in bad faith.

5 Ultimately, Judge Kemler granted the defense
6 motion and ordered a new trial in that case.

7 And the point I'm getting at is, is that
8 Detective Ignacio was at the center of a *Brady* violation
9 that took place. That information --

10 THE COURT: One *Brady* violation doesn't
11 means that he's committed multiple *Brady* violations.

12 MR. AQUINO: No, what I'm saying that is
13 information that should have been disclosed to us at the
14 time of trial or immediately prior to the trial
15 Detective Ignacio testified in our case.

16 THE COURT: Do you have information that the
17 government had in its possession this information?

18 MR. AQUINO: No, but I don't have to. I
19 don't have to, and this is what I mean. I cited to you
20 the Supreme Court case -- if I could find it one second.

21 THE COURT: *Kyles versus Whitley*?

22 MR. AQUINO: It's a cousin of that. It is
23 *Youngblood versus West Virginia*, 2006 Supreme Court
24 case.

25 The Court goes on to say, "the individual

1 prosecutor has a duty to learn any favorable evidence
2 known to the others acting on the government's behalf in
3 the case, including the police".

4 And so, what I submit is, this is
5 information that should have been disclosed to us. Am I
6 imputing bad faith to government lawyer in this case
7 about that issue? I'm not. But what I am submitting is
8 that she had a duty to learn of this information and to
9 question her witnesses that are called in her case in
10 chief, which included Detective Ignacio.

11 And ultimately, what we do know is that
12 Judge Kemler did grant a new trial in this case to Mr.
13 Garay as a result of a *Brady* violation.

14 Now, the last issue, again, deals with the
15 behavior of the government in this case. And I cited
16 the issue about when the Court and the whole -- the dust
17 up over the Gatuso identification process, admonished
18 the prosecutor in front of the jury.

19 But, that did not occur in a vacuum. That
20 occurred after frequent, frequent speaking objections in
21 which witnesses were basically suggested answers in the
22 course of speaking objections that took place by the
23 prosecutor in our case.

24 In addition to that, I made a big point in
25 front of the jury of arguing the issue about the

1 unimpeached testimony of Mr. Cosmo Gonzales. In our
2 final closing, the government stood up and their
3 argument was, why would Duende, that is Del Cid, and
4 Gatuso Sen Genaro plead guilty if what they were saying
5 was not true?

6 That argument ran precisely counter to jury
7 instruction number 80. Jury instruction number 80 in
8 this case reads as follows: "You have heard testimony
9 from a government witness who pled guilty to charges
10 arising out of the same facts of this case. You are
11 instructed that you are to draw no conclusions or
12 inferences of any kind about the guilt of the defendant
13 on trial from the fact that a prosecution witness pled
14 guilty to similar charges. That witness's decision to
15 plead guilty was a personal decision about his own
16 guilt. It may not be used by you in any way as evidence
17 against or unfavorable to the defendant on trial here."

18 In other words, the argument that counsel
19 engaged in ran contrary to the law of the case as
20 described -- as described in instruction number 80.

21 Finally, we're also dealing with that issue
22 about the *Brady* violation. Again, I don't impute bad
23 faith on *Brady* violation to the government in this case,
24 but they did have a duty to learn of that from Detective
25 Ignacio.

1 And by the way, Detective Ignacio admitted
2 that he was a 20-year police veteran, meaning, he knows
3 what's *Brady* -- he knows what that's all about.

4 THE COURT: All right.

5 MR. AQUINO: And for these reasons, I would
6 ask the Court to order a new trial in this case.

7 Thank you, Judge.

8 THE COURT: Thank you.

9 MS. MARTINEZ: Good morning, Your Honor.

10 THE COURT: Good morning.

11 MS. MARTINEZ: Unless Your Honor has a
12 different preference, I'll take up the arguments in the
13 order Mr. Aquino has made them.

14 THE COURT: That's fine.

15 MS. MARTINEZ: Starting first with his
16 argument that his client should have been severed and
17 that there was prejudice spillover evidence, Your Honor,
18 we've litigated this motion a number of times. It was
19 litigated before trial. It's been briefed on a number
20 of occasions. I don't want to sit here and read case
21 law to Your Honor or recite all of the exact same
22 arguments.

23 But to briefly sum up, this is -- Mr. Aquino
24 is complaining about evidence that was submitted,
25 presented to the jury, that was direct evidence that was

1 first of all, relevant for two reasons. First it was
2 direct evidence of crimes that other defendants were
3 charged with and that the jury was asked to deliberate
4 on with respect to other defendants.

5 It also was relevant in this case, because
6 as Your Honor pointed out, this is a racketeering case.
7 It's a case where the government has the burden of
8 proof, not just to prove the individual violent acts of
9 which each individual defendant is accused, but also to
10 prove that MS-13 is a racketeering enterprise and all of
11 the elements that go along with that. And it does
12 require the government to put on evidence of other
13 crimes, including violent acts such as murders and the
14 other crimes that Mr. Aquino has complained about today,
15 including drug distribution, and the limited evidence of
16 sex trafficking, et cetera.

17 So, all of that was proper. In addition to
18 that, Your Honor, as the Fourth Circuit has made clear,
19 the jury is assumed, under Fourth Circuit law, to follow
20 Your Honor's instructions. And in particular, to follow
21 curative instructions from Your Honor which Your Honor
22 properly issued at the close of the case, instructing
23 the jury that it should -- should not consider evidence
24 of violent crimes attributed to other defendants as
25 evidence of guilt against defendants who are not accused

1 of that crime.

2 Has Your Honor has pointed out, as Your
3 Honor's questions has aptly honed in on, there is no
4 question that the jury fully understood that defendant
5 Chavez was accused of only one violent act, that was the
6 murder of Julio Urrutia and that it was not to consider
7 the evidence of other violent crimes as evidence of
8 Mr. Chavez's guilt of killing Julio Urrutia.

9 THE COURT: They were also instructed
10 multiple times to give separate consideration to all the
11 evidence of each of the individual defendants and that
12 government counsel or defense counsel did not state the
13 law but that my instructions orally and in writing state
14 the law. Is that right?

15 MS. MARTINEZ: I agree with that completely,
16 Your Honor.

17 THE COURT: All right. If you would go on
18 now to the issue of the exculpatory evidence.

19 MS. MARTINEZ: Would you like the Detective
20 Ignacio issue -- is that the issue that --

21 THE COURT: That's the issue I'm talking
22 about.

23 MS. MARTINEZ: Okay. We will skip right
24 over weight of evidence or do you want to hear argument
25 on that?

1 THE COURT: I don't need weight of evidence.
2 Thank you.

3 MS. MARTINEZ: With respect to Detective
4 Ignacio, I'd actually like to first address, if Your
5 Honor doesn't mind, the *Garay* issue. That's --
6 everything else I think was argued to the jury and I can
7 certainly respond to all of that.

8 But, the issue that Mr. Aquino raised in his
9 reply to our response about the *Garay* case is a new one.
10 And that's not something that was argued to the jury nor
11 should it have been. And it's not something that we
12 have argued about until just today in court.

13 Your Honor, first of all, as we put in our
14 pleadings, the U.S. Attorney's Office had no knowledge
15 of that case. But I agree with Mr. Aquino if a
16 detective who was identifying a case or is testifying as
17 a witness did have knowledge of something that actually
18 was exculpatory or disclosable under *Brady* or *Giglio*,
19 that we did have a duty to discover that and to disclose
20 it if necessary.

21 That's not the situation here. That
22 information was not disclosable. Mr. Aquino has not
23 argued -- there was a *Brady* violation. That's clear.
24 Judge Kemler found that caused reversal of a jury
25 verdict. We take no issue with that.

1 But Mr. Aquino is not arguing that there is
2 *Brady* information that came out in the *Garay* case that
3 somehow is exculpatory as to his client. What he's
4 arguing, actually, is that it's *Giglio* as to Detective
5 Ignacio.

6 He's arguing that what happened in the *Garay*
7 case makes Detective Ignacio untrustworthy or dishonest
8 and that that's information he was entitled to so that
9 he could cross-examine Detective Ignacio about it. At
10 least that's how I understand his argument.

11 THE COURT: It seems to be focused on
12 impeachment --

13 MS. MARTINEZ: Exactly.

14 THE COURT: -- whether or not his testimony
15 was credible.

16 MS. MARTINEZ: So, the issue here is
17 whether -- Mr. Aquino is making a number of assumptions
18 that are nowhere present in the pleadings, in *Garay*, in
19 Judge Kemler's order in *Garay*, or even in the transcript
20 of the proceedings which the U.S. Attorney's Office took
21 pains to obtain in order to read and make sure that our
22 understanding of those proceedings was accurate.

23 And our understanding, and I believe this to
24 be true, is that Judge Kemler at no point made any
25 finding about Detective Ignacio, about misconduct by

1 Detective Ignacio.

2 To the best of our knowledge, Detective
3 Ignacio has not been disciplined or sanctioned in any
4 way. There's been no finding that Detective Ignacio
5 acted dishonestly in any way, shape or form.

6 What the pleading and the outcome in *Garay*
7 showed was that there was lots of information that was
8 going on and the dots were not connected.

9 The issue in *Garay* that relates to Detective
10 Ignacio concerns interviews of witnesses in unrelated
11 murder investigations that occurred a few days or a
12 couple weeks before trial. And it turned out that
13 information that came from those witnesses had relevance
14 to the *Garay* case.

15 Now, certainly, those dots should have been
16 connected. Certainly that information should have been
17 disclosed and that's what led to the *Brady* violation
18 that Judge Kemler found. But there was no finding that
19 someone committed misconduct. And one doesn't need to
20 find that for a *Brady* violation.

21 If there was information and it didn't get
22 disclosed, even if that was an accident or a mistake, or
23 a completely innocent, that still violates the
24 defendant's rights. And that's -- that's proper.
25 That's the law and that would be the law here as well,

1 Your Honor.

2 But there simply was nothing that came out
3 of the *Garay* case that impeaches Detective Ignacio. And
4 so, even if we had had that information and had
5 disclosed it -- and I submit it wouldn't be something
6 that would need to be disclosed -- but if we had
7 disclosed it, Mr. Aquino wouldn't have been able to
8 cross-examine Detective Ignacio on it because it
9 wouldn't have been permissible impeachment evidence
10 under 608(b). It's not evidence of his dishonesty.
11 It's not evidence of a felony. So there's nothing there
12 that Mr. Aquino actually could have questioned Detective
13 Ignacio about.

14 But, Your Honor, in addition to all of those
15 arguments, there's one argument that we raised in our
16 pleadings that Mr. Aquino did not answer when he
17 responded to our pleading and that he did not answer in
18 argument before this Court, which is when Mr. Aquino
19 learned of this information, this information was all
20 publicly available, in public pleadings and it was all
21 available before this trial started. It was available
22 before Detective Ignacio testified.

23 And, the law is clear, Supreme Court law and
24 Fourth Circuit law that when the defendant has the
25 ability to independently discover information, *Brady*

1 information, *Giglio* information, there can be no
2 violation when the government does not disclose it.

3 And he actually did independently discover
4 it. It was brought to our attention by Mr. Aquino's
5 pleadings. He independently discovered it.

6 If he independently discovered it before
7 Detective Ignacio testified, the entire argument is moot
8 because he actually had the information which he claims
9 to be impeachment information.

10 But even if he didn't actually have it, the
11 fact that he could have obtained it, because it was
12 publicly available, in a public state proceeding, and
13 the pleadings that Mr. Aquino attached they were
14 publicly available before the trial even started which
15 was, of course, weeks before Detective Ignacio
16 testified.

17 So, for both of those reasons, in addition
18 to our argument that it is not proper impeachment
19 evidence, that it was not disclosable as *Giglio* against
20 Detective Ignacio, we would submit that there's no cause
21 to reverse the verdict for the -- on that ground.

22 THE COURT: All right.

23 MS. MARTINEZ: Would Your Honor like
24 argument on any of Mr. Aquino's other issues?

25 THE COURT: No, I think that the issue of

1 severance has been fully explored multiple times and
2 you've just addressed the issue of the *Brady* violation
3 if there was one.

4 From the standpoint of materiality, I think
5 that if Detective Ignacio had committed perjury or
6 suppressed witness testimony, that certainly would have
7 been *Brady* material that might have bared on his
8 credibility. Do you agree with that?

9 MS. MARTINEZ: Yes, Your Honor. And we're
10 not aware of any evidence that he either testified
11 untruthfully or that he intentionally suppressed any
12 information. We're not aware that any court or any
13 internal -- that there was sort of internal
14 investigation or anything like that, that there was any
15 finding that he committed any sort of misconduct.

16 THE COURT: All right. And I made an
17 observation that I thought Mr. Aquino's identification
18 arguments about the identification of the witnesses, it
19 sounded very much like closing argument, didn't it?

20 MS. MARTINEZ: I would agree, Your Honor.
21 And we're happy to rest on our closing argument or
22 address any questions that the Court has.

23 THE COURT: I was there for seven weeks. I
24 think I remember the trial. Thank you.

25 MS. MARTINEZ: Thank you, Your Honor.

1 THE COURT: Mr. Aquino, anything further?

2 MR. AQUINO: Just a follow up on that issue.
3 I learned of this information concerning Detective
4 Ignacio well after our trial. And actually, I submitted
5 it as part of our reply to the government's brief.

6 THE COURT: Did Judge Kemler decide that
7 Detective Ignacio had lied?

8 MR. AQUINO: I don't believe she made that
9 finding, Judge.

10 THE COURT: Did she say he had suppressed
11 evidence?

12 MR. AQUINO: No.

13 THE COURT: All right, okay. Thank you.

14 MR. AQUINO: The significance, though, that
15 I see to it is that he had a duty to come forward and
16 make the defense counsel through the Commonwealth's
17 lawyers aware of this information since he was going to
18 be a witness in the trial that took place in front of
19 Judge Kemler that ultimately was reversed. And so for
20 these reasons I renew our request.

21 THE COURT: Thank you very much.

22 You want to take up Mr. Paiz Guevara's
23 motion, Mr. Chick?

24 MR. CHICK: Good morning again, Your Honor.
25 Mike Chick on behalf Mr. Paiz Guevara. I'll be very

1 brief. The pleading is laid out. I think it's pretty
2 straightforward.

3 From our perspective, what happened during
4 the -- during the government's rebuttal closing
5 arguments was unconstitutional burden-shifting argument.
6 It was pretty egregious and what takes it to the next
7 level is after the objections were made, curative
8 measures were requested, not only curative instruction
9 being requested, but then also, you know, request for
10 mistrial and so on and so forth.

11 And, the Court actually overruled the
12 objection. And what happened after that is really
13 what -- from my perspective, takes this to the next
14 level of creating substantial prejudice to Mr. Paiz
15 Guevara and really to the other defendants as well, is
16 that the government came back. The government stood up
17 and essentially now with the Court's blessing, very
18 incredulously and very, I would say indignantly and
19 boldly, rehashed all of those arguments and pounded them
20 even harder. And we were essentially in a helpless
21 position at that point to the prejudice of Mr. Paiz
22 Guevara.

23 Certainly, the cases say that what the Court
24 should do in those circumstances is sustain the
25 objection, and that a Court should caution the

1 government not to conduct that type of argument.

2 And many of the cases that we cited in our
3 pleadings actually are cases where they're up on appeal
4 and the Court of Appeals -- the Court of Appeals rules
5 against the defendant in those cases.

6 And in each of those cases, what the Circuit
7 Court does is the Circuit Court relies on the curative
8 measures that the trial court took. And in this case,
9 we just don't have those.

10 And for those reasons, we do ask that the
11 Court grant Mr. Paiz Guevara a new trial because of the
12 unconstitutional burden-shifting arguments that were
13 made.

14 If the Court has other questions for me, I'm
15 happy to answer them.

16 THE COURT: Mr. Chick -- and maybe I did
17 this. I believe I did.

18 From the very beginning, jury selection, I
19 told the jury about the presumption of innocence. I
20 told the jury that what you lawyers say is not evidence.
21 That was done before trial. That was done in the
22 written instructions. That was done orally, wasn't it?

23 But of course, it was not done, as you say,
24 in response to your objection. But you do agree I did
25 instruct them multiple times of those principles. Do

1 you agree with that?

2 MR. CHICK: Those instructions were made
3 sort of the typical times those types of instructions
4 were made by the Court. They were. And from our
5 perspective, the problem is that when the jury sees what
6 happened and when things play out the way that they did,
7 and then, in the moment when such an instruction is not
8 given, in the jury's mind, those things that happened
9 before are, you know, for lack of a better phrase, lip
10 service or something else.

11 That's the problem with -- with that type of
12 a situation or looking at it from that perspective.

13 THE COURT: Well, because the jury has
14 written instructions, and I believe I gave them -- I
15 think each juror had a written copy of the instructions
16 even after all this took place. I understand your
17 position.

18 Thank you.

19 MR. CHICK: Thank you, Your Honor.

20 MR. TOBLER: Thank you, Your Honor. I'll be
21 brief.

22 The Court was entirely correct in the way it
23 dealt with the defendant's motion at the time the
24 defendant made it in court.

25 As Your Honor is --

1 THE COURT: What led to this argument any
2 way?

3 MR. TOBLER: The defense -- the defendant's
4 argument in closing was that the government had
5 possession of transcripts and recordings that were
6 exculpatory in nature that the government had not put in
7 front of the jury.

8 And the Fourth Circuit law is very clear
9 that under those circumstances the government is
10 perfectly justified in making a response, not in which
11 they shift the burden to the defendant and say the
12 defendant has any burden of proving his own innocence,
13 but simply in pointing out that the defendant had the
14 ability to present that evidence themselves. And the
15 cases cited in the government's brief make that very
16 clear.

17 The standard for overturning a jury verdict
18 because the prosecutorial misconduct is very high. It
19 requires not only that there be an improper statement
20 made, but that it be egregious and deprive the defendant
21 of a fair trial.

22 In this case, even that low bar is not met
23 because the comments that were made in rebuttal argument
24 by government counsel was entirely proper. I will also
25 point out that in addition to the instructions that Your

1 Honor mentioned that were given to the Court, excuse me,
2 that were given to the jury multiple times about where
3 the burden lies, government counsel also made that point
4 multiple times in front of that jury. So not only is
5 there no egregious conduct in this case, there is not
6 even improper conduct.

7 The steps that were taken, the argument that
8 was made in rebuttal by government counsel has been
9 fully blessed in the case law which is set forth in the
10 government's paper. So unless there --

11 THE COURT: I'm not sure the judges can
12 bless anything, but I appreciate what you just said.

13 MR. TOBLER: Thank you, Your Honor.

14 THE COURT: Anything further, Mr. Chick?

15 MR. CHICK: No, sir.

16 THE COURT: All right. Thank you very much.
17 Let's take up Mr. -- the next motion. That's you,
18 Ms. Amato.

19 MS. AUSTIN: Your Honor, yes.

20 THE COURT: Are you arguing for the joint
21 motion or is somebody else doing that?

22 MR. AQUINO: Ms. Austin.

23 THE COURT: I'm sorry.

24 MS. AUSTIN: Your Honor, I'm going to argue
25 the motion regarding production of defendant's

1 statements. Mr. Zimmerman's going to argue the other
2 motion that was filed.

3 THE COURT: Okay, great.

4 MS. AUSTIN: Your Honor, we move for a new
5 trial based on the government's failure to meaningfully
6 disclose statements by the defendants. Particularly
7 Mr. Gaitan Benitez, but I believe all the defendants
8 have joined in this motion.

9 And specifically, as it became clear during
10 the trial, there were written statements of Mr. Gaitan
11 Benitez in the government's control that were not
12 produced to the defendant.

13 THE COURT: Now, tell me about these
14 statements that you say the government had that he --
15 are these statements that Mr. Benitez wrote?

16 MS. AUSTIN: I'm sorry.

17 THE COURT: Are these statements that
18 Mr. Benitez wrote?

19 MS. AUSTIN: No.

20 THE COURT: Then what statements were they?

21 MS. AUSTIN: They were statements that he
22 made to the government witness, Junior, who was working
23 with the FBI, so was an agent of the government at that
24 point, which were not only being recorded but were being
25 listened to by another government agent and

1 contemporaneously writing down what was being said.

2 And that is those summaries produced by the
3 contract language monitors of the phone conversations
4 that Junior was having with Mr. Alvin Gaitan Benitez as
5 well as the other defendants.

6 THE COURT: So, then let's be clear. So the
7 actual statements themselves were the recordings of
8 Mr. Benitez speaking himself; is that right?

9 MS. AUSTIN: They are statements that
10 Mr. Benitez made.

11 THE COURT: Himself speaking that were
12 recorded contemporaneous at the time he made them. Is
13 that right?

14 MS. AUSTIN: Yes.

15 THE COURT: So then what you're asking for
16 is something I think we litigate at pretrial, and that
17 is, should the government be required to give you a
18 transcript that identifies the speaker and their
19 interpretation of it; is that right?

20 MS. AUSTIN: No, no.

21 THE COURT: Okay.

22 MS. AUSTIN: This wasn't litigated prior to
23 trial because we did not know the existence of these
24 contemporaneous summaries before the trial started. It
25 only became clear to us during the testimony of the

1 contract language monitors that they were listening to
2 the conversations and preparing summaries.

3 Now, Your Honor we did litigate the
4 transcript issue, and those transcripts were prepared
5 later.

6 So, they weren't contemporaneous written
7 versions of a defendant's statement.

8 THE COURT: So what part of Rule 16 do you
9 say applies here?

10 MS. AUSTIN: The part that says "any
11 relevant written or recorded statement made by the
12 defendant within the possession, custody or control of
13 the government, the existence of which is known".

14 THE COURT: What written statement do you
15 say the government had that they should have produced?

16 MS. AUSTIN: The summaries produced by the
17 contract language monitors as they were listening to the
18 defendants speaking.

19 THE COURT: As I'm hearing what you said, it
20 sounds like the summary was written by the contract
21 monitor. Is that right? The summary was written by the
22 contract monitor?

23 MS. AUSTIN: Right.

24 THE COURT: So the summary would not be the
25 defendant's statement, would it?

1 MS. AUSTIN: Yes, "a defendant's statement
2 is discoverable when it or an account thereof is written
3 or recorded promptly after the statement is made".

4 So, yes, it is. It's just like being
5 interviewed by an FBI agent and the FBI agent taking
6 down the statement of a defendant. It's a defendant's
7 statement that was written down at the time it was made.
8 And we didn't even know they existed.

9 So, we -- and the government had them, and
10 now -- I'll go ahead and argue this point. The
11 government's going to say, hey, we gave all the
12 recordings, we gave them all to the defense counsel, and
13 we identified the ones that we were going to use.

14 That is irrelevant to this argument. They
15 dumped over 178 hours of Spanish recordings on the
16 defense counsel. Your Honor did give us funds to try to
17 translate these recordings. We weren't told who was
18 speaking. We weren't given any information.

19 THE COURT: Well, I want to focus on they
20 were given to you how far in advance of trial,
21 Ms. Austin?

22 MS. AUSTIN: Several months, they were given
23 to us several months. It was an insurmountable task, as
24 it turns out, for us to do any meaningful translation of
25 those telephone calls.

1 THE COURT: Well, I guess the question --
2 that becomes a matter of how you all allocated your time
3 and resources because you had them for not just several
4 months, I believe it was 12 to 14 months. Is that
5 right?

6 MS. AUSTIN: Yes, I don't know the exact
7 number, but I'm agreeing with Your Honor that we had
8 them for a while, yes.

9 THE COURT: And then the issue of
10 identifying the speaker, would you agree with me that if
11 the government identified a speaker as Mr. Romero Cruz
12 and the defense had evidence it was actually Mr. Lopez
13 Torres, would that be a question of fact for the jury
14 about the accuracy of the transcript?

15 MS. AUSTIN: See, Your Honor, yes, I will
16 answer your question "yes". But, I am not saying we
17 should have gotten the transcripts -- because the --
18 there are two separate recordings of these phone
19 conversations.

20 We have the transcripts that were produced
21 in the binders right before trial and we were looking
22 over them during the trial and figure -- you know, we
23 saw, okay, these are the ones that are going to be used.

24 THE COURT: No, they told you months earlier
25 which ones they were going to use. They told you about

1 200 of them; is that right?

2 MS. AUSTIN: Right, the ones they deemed
3 relevant.

4 THE COURT: Right.

5 MS. AUSTIN: But there were more statements
6 by my client that were written down at the time he made
7 them that were the summaries, not the transcripts, but
8 summaries that were not provided to us prior to trial in
9 violation of Rule 16.

10 And I just want to also state to the Court
11 that the cases the government cites about there's no
12 real obligation by the government to give transcripts to
13 the defendants just to provide the recordings, those are
14 excerpts of cases that were pulled out and cited by the
15 government in defense of its position that it didn't
16 have an obligation to turn those summaries over to us.

17 But, in the case of *United States versus*
18 *Bailey* that the government cited, 689 F.Supp. 1463, it's
19 Northern District of Illinois, that deals with -- a
20 defendant in that case, where there were many, many,
21 many recordings, as for tapes that the government
22 intended to use as impeachment evidence. So the issue
23 in that case is different from this issue.

24 But, what did happen in that case is that
25 the Court ordered the government to produce all tapes

1 and transcripts of any tape recorded conversation
2 relating to the matters alleged in the indictment.

3 So, in that case, the District Court did
4 exactly what we're now saying the government should have
5 done at the beginning of this case. When it handed us
6 the recordings of the phone calls, the summaries should
7 have come along with those recordings because they were
8 written versions of our clients' statements.

9 And, the Court ordered those transcripts to
10 be produced in that case, in the *Maze* case they cited
11 which is unpublished, but it's a 2011 West Law case of
12 5320976 saying, again, the issue in that case was --
13 let's see, whether a -- and, this is what's interesting
14 about this case. The government agreed to provide the
15 defense in the *Maze* case what they call line sheets of
16 tape recorded phone calls of the defendants, which are
17 basically synonymous with what my argument is regarding
18 this summaries. They were lined sheets. They were
19 drafts, quick drafts of what the defendant said in the
20 recordings.

21 And the government said, we'll turn these
22 over to the defense, but we want a stipulation that when
23 it comes to trial, if there's some sort of typo or we
24 have since then corrected what we believe the phone call
25 actually says, the defense can't then come back and say,

1 oh, well, your summary says this. And so they made a
2 stipulation, look, we're going to give you these because
3 we're giving you an enormous amount of phone calls and
4 these are line sheets statements made by your clients
5 and the government produced them.

6 And what comes up later in this case is an
7 issue completely different than what we are arguing
8 here. But what's important is in both of those
9 district -- yes, District Court cases, the government
10 produced the writings, the summaries, those things that
11 were produced contemporaneously with what statements --
12 with the defendant's statements.

13 And, like I said, this all sort of -- it was
14 a rolling realization on our part of what was actually
15 out there.

16 For months, we struggled trying to figure
17 out what these -- who was even on the recordings, who
18 people were talking to. They were of such poor quality,
19 our translator couldn't make sense of them. And then it
20 became abundantly clear during trial that these contract
21 language monitors were listening to the phone calls as
22 they were being made and summarizing them and knew
23 exactly who was speaking.

24 And if -- Junior testified at trial that he
25 had 40 conversations with Mr. Alvin Gaitan Benitez on

1 his phone that were recorded -- where these phone calls
2 were being recorded. Three phone calls involving
3 Mr. Alvin Gaitan Benitez were produced by the
4 government. So, that leaves 37 statements by Mr. Alvin
5 Gaitan Benitez made to a government agent that were
6 written down that we did not receive in discovery.

7 And, so, Your Honor --

8 THE COURT: All right. Well, help me with
9 prejudice. Is that a fact I should consider here?

10 MS. AUSTIN: Yes.

11 THE COURT: Can you describe prejudice for
12 me in this case as it relates to the recordings,
13 particularly when you all had all the tapes for many,
14 many months and then you had your own person or persons
15 to do -- and I don't really remember any defense witness
16 coming in and saying, well these transcripts are all
17 wrong. I remember cross-examination about that.

18 But I don't remember any defense witness
19 coming in and saying these transcripts were all God
20 awful. They're not right and there are a lot of typos
21 and misstatements. Do you remember any of that at
22 trial?

23 MS. AUSTIN: No, no, and I'm not arguing
24 that the transcripts --

25 THE COURT: Well, help me with prejudice

1 then. What's the prejudice?

2 MS. AUSTIN: Well, to be quite honest, I
3 don't know. That's why alternatively we're asking for
4 you to order the government to provide those statements
5 under Rule 16 to us so we can see. We don't even know
6 what is in those statements because we've never seen
7 them. We've never been able to review the written
8 statements of our client that was made.

9 THE COURT: But you have the original
10 recordings. You just don't have what the government's
11 language monitor wrote down, correct?

12 MS. AUSTIN: That's correct.

13 THE COURT: All right, thank you.

14 MR. TOBLER: Your Honor, from the Court's
15 questioning, I think it's fairly obvious that the Court
16 understands the government's position, so I'll be very
17 brief.

18 THE COURT: I want you to address the issue
19 of summaries. These contract language monitors, it
20 seems to me, I had real questions of all of their -- and
21 the defense questioned their qualifications and the
22 reliability of it.

23 Is the monitor summary the defendant's
24 statement?

25 MR. TOBLER: It is not, Your Honor. I think

1 the law makes very clear in the cases that have been
2 cited -- well, to start with the face of the rule
3 itself, the words of Rule 16, they are entitled to the
4 recorded or written statements of the witness.

5 They received recorded statements of the
6 witnesses. They have received those recorded statements
7 approximately 16 months before trial began.

8 The government fully met its Rule 16
9 obligations at the time it provided those materials.

10 There were a number of cases cited in the
11 government's brief in which the Court adopted the
12 position that is before the Court here, which is that
13 Rule 16 does not entitle a defendant to anything other
14 than the recorded statements themselves.

15 And it's no answer to distinguish on the
16 grounds of what the government did or did not do in that
17 case. As a legal matter, Rule 16 does not entitle them
18 to more than the recorded statement.

19 And I would point out, Your Honor, that --
20 take issue as defendants might with the authority that's
21 been cited by the government, there is no authority
22 cited in the defendant's paper for the -- for the
23 proposition that in addition to producing the recorded
24 statements themselves, the government must also produce
25 all work product in which a summary is made of those

1 recordings.

2 And I think Your Honor has recognized that
3 in its previous rulings in this case in which defendants
4 have sought in addition to the recorded statements
5 themselves, again, recorded statements that they've been
6 in possession of for a year and a half at the time the
7 trial began. And, as Your Honor pointed out, we
8 directed them to 200 calls that were particularly
9 pertinent. And the Court made money available for them
10 to use to translate these recordings. The obligation
11 was fully met and then some under Rule 16.

12 THE COURT: Thank you.

13 MR. TOBLER: Are there any further
14 questions, Your Honor?

15 THE COURT: No.

16 MR. TOBLER: Then we would rest on our
17 papers.

18 THE COURT: Anything further, Ms. Austin?

19 MS. AUSTIN: Just briefly.

20 Discovery production has to be meaningful.
21 It just keeps getting repeated that you had the
22 recordings, the defense had the recordings, the
23 defendants had the recordings months.

24 Those recordings were such and of such
25 volume that it is not fair, and it does prejudice the

1 defendant for the government to be able to say "here you
2 go", and that's it. They are in Spanish. They are of
3 such poor quality. The volume is such that even giving
4 us funds and starting completely from scratch in as much
5 as the contract language monitors were, as the
6 government said, very well versed in the El Salvadorian
7 dialect, knew stuff, knew gang slang and they had the
8 benefit of talking to Junior, talking to Agent Uribe,
9 and they were working the case in producing a written
10 statement of our defendant as he made a statement over
11 the telephone.

12 And so to say that we were on equal footing
13 or even close to it because they gave us the recordings
14 is -- is false. And dumping that volume of recordings
15 on us in Spanish was not meaningful discovery and so,
16 that --

17 THE COURT: But, your client speaks Spanish,
18 is that right, Ms. Austin? Does your client speak
19 Spanish? Okay, and do you speak Spanish, too?

20 MS. AUSTIN: No.

21 THE COURT: When you talk to your client, do
22 you have an interpreter present?

23 MS. AUSTIN: Yes.

24 THE COURT: I can't make the case something
25 that it's not. The whole trial was in Spanish, and the

1 defendants speak Spanish. That's their first language.
2 But we had six interpreters, and they were in court
3 every single day. I don't know what to tell you. I
4 guess I could give you five years to prepare for trial
5 and that still would not have made any difference
6 because the Court knew the quality of them was so poor
7 it wouldn't have made any difference any way.

8 I understand your position. But I
9 understand, this is only a Rule 16 motion, and it seems
10 very similar to something I decided before, but I
11 appreciate your argument. Thank you.

12 MS. AUSTIN: Your Honor, I would just like
13 to point out that I don't think you -- you have decided
14 this before because until in the middle of trial, we
15 didn't know these summaries existed.

16 So, I'm not saying that you had this issue
17 before. You ordered the production of the tapes. You
18 said they don't have to give you the transcripts. We
19 didn't argue over contract language monitors summaries,
20 because we didn't know they existed.

21 THE COURT: I didn't know about them either.
22 But I don't think it changes whether under Rule 16, the
23 summaries prepared by a government contract monitor are
24 equivalent to your client's statement. But I appreciate
25 your argument. You're making your record as you are

1 supposed to do. And I suspect that the Fourth Circuit
2 would have to give a decided judgment about that.

3 MS. AUSTIN: Thank you.

4 THE COURT: Mr. Zimmerman.

5 MR. ZIMMERMAN: Thank you, Your Honor.

6 Your Honor, if I might just pick up at the
7 end of that last motion and the Court's comment about
8 the Fourth Circuit is that we would ask and Ms. Austin
9 references for possible evidentiary hearing, but in the
10 absence of that -- and there's going to be a similar
11 request with the other motion -- we would ask that the
12 summaries be produced for the purposes of appeal. That
13 is that we are -- one of the difficulties that I'd like
14 to emphasize here is we don't know who is on any of
15 those recordings. This was actually somewhat of a
16 contentious issue --

17 THE COURT: That was a question of fact, who
18 was on the tapes; is that right, Mr. Zimmerman?

19 MR. ZIMMERMAN: On all of the recordings.
20 Not -- Your Honor, I'm not talking about the recordings
21 that were introduced into evidence.

22 THE COURT: Oh, okay.

23 MR. ZIMMERMAN: Okay. I'm talking about 170
24 plus hours of the recordings that we tried to slog
25 through. And, Ms. Austin isn't going to toot her own

1 horn here, but she sort of took the lead on this and
2 found the best interpreters that we knew in the area and
3 was constantly working on this and constantly e-mailing
4 us translations, and I want to make a record of that.
5 But, we don't know who is even on those tapes.

6 And I remember this was a contentious issue.
7 I think it was Gretchen Karlson (sic) whose client
8 ultimately pled. But this was a joint motion of all of
9 us, where we said, you know, at least identify for us
10 who this is because they're working with Junior, they're
11 working with Special Agent Uribe.

12 We not only have voices that are hard to
13 distinguish, but there's absolutely no way for us to
14 know who's on the tapes.

15 THE COURT: There actually is a way for you
16 to know who was on the tapes. It's called "play the
17 tape for your client". And I suspect, good lawyers that
18 I know you to be, that at some point you did that.

19 Now, I'm not asking you to tell me what your
20 client said, but I mean there comes a point where you
21 have to draw upon what you have and the facts are what
22 you have.

23 Now, would you like to turn to your motion,
24 because as I understood it, the issue was whether the
25 government had an obligation to produce more than you

1 already received concerning immigration benefits that
2 they gave Junior, the bankruptcy petition, and monetary
3 benefits. Is that it?

4 MR. ZIMMERMAN: It is, Your Honor. And we
5 have argued and actually, the government did not
6 produced the bankruptcy petition.

7 THE COURT: You have that on your own.

8 MR. ZIMMERMAN: Mr. Salvato obtained a copy
9 of that. And the -- the issue is laid out in the
10 pleadings, Your Honor, is that as we pointed out,
11 Junior, who of course was the government's star witness,
12 his testimony was full of contradictions regarding his
13 own criminal activity.

14 For example, he testified that he didn't
15 commit any actions of violence and he testified that he
16 didn't brag about things he didn't do.

17 In the recordings that we did hear in
18 evidence, Junior bragged about his participation in the
19 robbery in which he threatened to cut a victim's fingers
20 off. He bragged in another part of the same transcript,
21 this is Government's Exhibit 18A1 about attacking gang
22 members at the Ballston Mall. He testified that he
23 didn't commit any crimes while working for the FBI but
24 he also testified that he collected extortion rent from
25 a brothel in Culmore.

1 We would submit and we'd ask for a *Brady*
2 material and extensive *Brady* pleading, I'm sure the
3 immigration materials, for his A file.

4 Now the government in their response suggest
5 that look, we're not responsible for what other
6 government agencies not involved in this prosecution
7 have, and so we don't have to go true the A file, for
8 example, for exculpatory or for *Brady* or *Giglio*.

9 In this case that doesn't really apply
10 because the government, the U.S. Attorney's Office was
11 very actively involved in seeking immigration benefits
12 for Junior. They wrote a letter to the judge on his
13 behalf. This, of course, was another lie that we caught
14 Junior on on direct. Junior testified that the letter
15 from the U.S. Attorney's Office did not get delivered to
16 the immigration judge.

17 On cross-examination it was revealed that
18 while the letter was returned, that Junior himself
19 showed it to the immigration judge.

20 So, this was the kind of games that Junior
21 played. When he says that judge didn't get the letter
22 it turns out he meant he didn't get it in the mail, but
23 he actually saw it, which of course was the basis of
24 question.

25 THE COURT: He actually took the letter to

1 the immigration judge, he said.

2 MR. ZIMMERMAN: He did, he did. After
3 testifying on direct that the Court did not get the
4 letter on cross, he admitted that, in fact, he showed it
5 to the judge.

6 THE COURT: So, I want to make sure we're
7 focused on what you're trying to do here. These are all
8 things you covered in front of the jury as a part of
9 impeachment. So what is it that you say the government
10 suppressed?

11 MR. ZIMMERMAN: We did not get the A file
12 and we believe we are entitled to the A file. And I
13 think that the A file certainly would contain examples
14 of additional lies and prevarications of the type that
15 we saw.

16 We'd be able to get much deeper, do much
17 more significant impeachment about that. For example,
18 did Junior report his activities such as extortion, such
19 as threats to cut a victim's fingers off? Did he report
20 them in the A file? And if he did --

21 THE COURT: But you asked him those
22 questions, didn't you? But you're saying the file would
23 show if he reported it?

24 MR. ZIMMERMAN: The file --

25 THE COURT: We don't have the application to

1 know what he told the government. Is that what you're
2 saying?

3 MR. ZIMMERMAN: We don't know what the truth
4 is, right, Judge. Sure we can ask Junior these things,
5 but we can't impeach him. So, it -- if he reported all
6 of these crimes or other crimes that we don't know about
7 in the A file, and nonetheless, he's still here in the
8 country, then he's getting significant benefit from the
9 government with regard to immigration and that is bias
10 and impeachment.

11 If in fact he didn't report all of these
12 crimes in the A file, then he's lied on his forms and
13 that is also impeachment.

14 Of course, we can ask Junior this, but
15 Junior is a liar. And to the extent we have recordings
16 and stuff, we can impeach him.

17 THE COURT: Your view is the government had
18 obligation to go to ICE and obtain his A file and
19 produce it to the defendant. I understand that
20 position.

21 MR. ZIMMERMAN: Well, Judge, I think there's
22 no doubt that the government had reviewed or -- or
23 agents had reviewed the A file. In other words, before
24 writing a letter to the immigration judge on behalf of
25 Junior, it's hard to imagine that they weren't familiar

1 with his A file in order to take seriously giving him
2 immigration benefits, which was a major part of the
3 inducement for him to be such a star witness for them.
4 It's hard to imagine that they didn't look at his A
5 file.

6 THE COURT: Well, you relied upon your
7 imagination. I can only rely on what is presented here
8 in court. I understand what you're saying.

9 MR. ZIMMERMAN: So, Judge, I think that's
10 one part of it. The other part of it is as far as the
11 appeal goes, we need a copy -- we would ask the Court --
12 there's sort of three requests we make in the motion.
13 The motion is for a new trial under Rule 33 for the
14 failure to disclose that any reasonable look at the
15 evidence in a situation this would have to be
16 exculpatory.

17 Number two, we would ask for an evidentiary
18 hearing in which the A file is actually produced and we
19 can go through it and make a record of this. And number
20 three, we would ask that the A file be produced for the
21 purposes of appeal so that we're not stuck in this catch
22 22 where the Fourth Circuit says to us, you know, you
23 can't point to anything in the A file that is
24 exculpatory.

25 Now the government is going to say that, you

1 know, we're trying to go on a fishing expedition here.
2 But again, Judge, there is no way -- if Junior loaded up
3 his A file with all his crimes and we can show that to
4 the jury and he still got a benefit, it shows massive
5 bias. If he didn't load up the A files with all his
6 crimes, then he's a liar and it also impeaches --

7 THE COURT: On the first point, the letter
8 was written because of his cooperation with the
9 government. So, the government had some idea about the
10 nature and extent of what they had him do and the
11 information he reported to them when they wrote the
12 letter. Is that right?

13 MR. ZIMMERMAN: That's right, Judge, but --

14 THE COURT: But the letter was supposed to
15 be given to an immigration judge and according to the --
16 Mr. Junior, the government's letter never got to the
17 judge but he took a copy of the letter to the judge. Is
18 that right?

19 MR. ZIMMERMAN: Right. So, when he was
20 testifying on direct about the benefits he was
21 receiving, he testified that the judge didn't get the
22 letter from the United States Attorney's Office. And
23 obviously the purpose and the implication of that
24 testimony to the jury is look, I'm not really getting a
25 benefit from the United States Attorney's Office, right,

1 because they drafted a letter that the judge didn't get.

2 And then on cross-examination when he's
3 pressed he says, okay, I showed it to the judge. So,
4 it's this type of gamesmanship by Junior that, you know,
5 really emphasizes the need to have the A file. With a
6 witness this slippery --

7 THE COURT: All right.

8 MR. ZIMMERMAN: -- it's not enough just to
9 ask him questions. So we would ask for those forms of
10 relief. And again related to the other motion we did on
11 behalf of Mr. Benitez, we would ask that the summaries
12 that the government has not produced also be produced
13 for the purposes of appeal so that the Fourth Circuit
14 doesn't say, look, you can't point to anything that
15 these discoveries would have revealed that you could
16 have actually identified information that you could have
17 used.

18 THE COURT: All right.

19 MR. ZIMMERMAN: Thank you, Your Honor.

20 THE COURT: Thank you.

21 MS. MARTINEZ: Your Honor, the FBI doesn't
22 have unfettered access to A files. A files, immigration
23 files contain highly personal information. They're
24 highly protected. They're maintained by a separate
25 government organization.

1 The FBI hasn't reviewed Junior's A file, had
2 no obligation to do so, and defense counsel can't point
3 to any case law that would suggest otherwise.

4 THE COURT: Well, while it might be tempting
5 to accept your word that the FBI didn't look at the
6 file, I'm not sure I can do that. There's no evidence
7 before me I can say that. And I'm not sure -- I'm
8 assuming maybe you had a -- questioned the FBI about the
9 A file.

10 MS. MARTINEZ: Yes, Your Honor.

11 THE COURT: But the issue for me is really
12 one of whether the A file is something that was in the
13 government's possession and should have been produced in
14 total to the defendant. Can you answer that question?

15 MS. MARTINEZ: Yes, Your Honor. So, first
16 of all, it would be hard to imagine a circumstance under
17 which *Brady* would require an entire A file to be
18 produced to defense counsel. And certainly those
19 circumstances are not present here.

20 Now, one could imagine a circumstance under
21 which particular information within an A file may need
22 to be produced if it were exculpatory and it were within
23 the possession of the prosecution team. Both of those
24 things would need to be met. But neither of those --
25 the first is that -- the A file was not within the

1 possession of the prosecution team, so that in and of
2 itself means we have no obligation to produce it.

3 Now, if I knew of something that was
4 exculpatory anywhere, whether it was in an A file or
5 otherwise, certainly. And if someone's knowledge could
6 be imputed to me by another member of the prosecutor
7 team, certainly we would have an obligation to produce
8 that. But that would never extend to an entire A file.
9 It is a fishing expedition.

10 What defense counsel is looking for is they
11 want to review the A file themselves so they can try to
12 find something that they think would contradict
13 something.

14 Now, Your Honor, I'm not going to parse
15 through every single characterization that Mr. Zimmerman
16 made just now and in his pleadings, but I do want to say
17 generally speaking that we disagree with many of the --
18 the ways in which Mr. Zimmerman has interpreted
19 testimony by Junior.

20 He's not sticking with just "these are the
21 exact words". When he says, there was testimony -- he
22 said that he wasn't involved in the violent act, but
23 then there was this statement in the transcript.

24 Well, there was also explanations offered
25 both in testimony and in argument by both sides about

1 why those are or are not inconsistent. But this is
2 getting into the nitty gritty details --

3 THE COURT: I don't need to retry the case.
4 I'm just trying to focus on whether the government had
5 the obligation to produce the A file and whether the A
6 file had information that was exculpatory that might
7 have been relevant for impeachment or mitigation or
8 punishment that was suppressed by the government that
9 also caused prejudice to the defendant.

10 There are several steps in the process, and
11 I understand you to be saying that the government didn't
12 have the A file. So I'll start there. You didn't have
13 the A file.

14 MS. MARTINEZ: We didn't have the A file,
15 Your Honor.

16 THE COURT: Now, there was testimony about a
17 letter the government wrote to the immigration judge,
18 and it was odd to me about why the letter was just
19 written and there was no follow up, because Junior
20 ultimately testified he actually gave the letter to the
21 immigration judge. Is that your recollection?

22 MS. MARTINEZ: Your Honor, the letter itself
23 was disclosed to defense counsel. Defense counsel had a
24 copy of that letter in our *Brady* disclosures and with a
25 letter from the U.S. Attorney's Office that went with

1 the letter. We disclosed the fact that the U.S.
2 Attorney's Office wrote that letter and we disclosed the
3 letter itself.

4 We also disclosed that the U.S. Attorney's
5 Office mailed the letter to the immigration court and
6 that the -- it was returned in the mail. Those were the
7 facts known to the government at that time and it was
8 all disclosed to defense counsel well in advance of
9 trial. What came up at trial was that Junior testified
10 and that was not known, was not known to me, certainly,
11 that he hand delivered that letter after it was returned
12 to the U.S. Attorney's Office.

13 But again, this is information that was
14 presented in front of the jury and that defense counsel
15 had an opportunity, both to cross-examine Junior about
16 and to argue to the jury. So there's no violation here.

17 THE COURT: Now, ultimately, an immigration
18 judge made a judgment that Junior could remain in the
19 United States, correct?

20 MS. MARTINEZ: Your Honor, off the top of my
21 head, I'm not actually sure of the status of his
22 proceedings and whether there's been a final
23 determination. And I'm not sure that is necessarily
24 relevant here. But I think it was clear testimony in
25 front of the jury that there were immigration

1 proceedings that involved Junior, yes.

2 THE COURT: But he's still here, or at least
3 he was still here at the time of trial.

4 MS. MARTINEZ: Yes, clearly.

5 THE COURT: Okay, all right. I think I
6 understand your position.

7 What's your position about evidentiary
8 hearing?

9 MS. MARTINEZ: Your Honor, there's
10 absolutely no need for an evidentiary hearing. I guess
11 Mr. Zimmerman is asking for two separate evidentiary
12 hearings; one on the summaries and a separate one on the
13 A file.

14 So starting first just with the summaries
15 and Mr. Tobler has already handled most of that
16 argument. But to just respond to what Mr. Zimmerman
17 argued, which was that they don't even know who were on
18 these calls. And they argued that these summaries from
19 the contract language monitors would help them see that.

20 I remind defense counsel and the Court that
21 the testimony from the contract language monitors which
22 was clear both in their direct and followed up
23 repeatedly on cross-examination was that these -- these
24 contract language monitors also did not know who was on
25 these calls. That was very clear. On the record in

1 front of the jury, they had no knowledge of who was
2 speaking, so those summaries can't possible help defense
3 counsel figure out who was speaking.

4 What could help defense counsel is what the
5 government gave defense counsel which is not just a mess
6 of recordings but an entire consensual wire including
7 metadata, metadata including in-going and out-going
8 phone numbers, metadata including date and time that the
9 call was made and duration of the call.

10 So defense counsel had more than just a dump
11 of recordings. And although defense counsel has again
12 and again complained about us dumping all of these
13 recordings, it was a consensual wire between a star
14 government witness and most of these defendants and
15 other co-conspirators and other MS-13 gang members.

16 If we had not given them that entire wire,
17 they would have been complaining about that. And
18 instead what we did, we gave them all of those
19 recordings in an organized fashion with metadata,
20 16 months before trial.

21 There is no need for evidentiary hearing on
22 that.

23 With respect to the A file again, defense
24 counsel has cited no case law that says that the
25 government has to go out and obtain A files for

1 government witnesses. That's not -- there's no
2 obligation there to do that, there never has been,
3 there's no case law to support that. Defense counsel
4 can't cite any. And so there's no grounds here to
5 produce for appeal purposes or for an evidentiary
6 hearing, discovery that they were never entitled to to
7 begin with so that we can all review it post verdict and
8 see if there was some way to nitpick at it.

9 And then, Your Honor, finally as Your Honor
10 mentioned a moment ago, even if there was any violation
11 here, which we strongly submit there was not, there
12 would have to be prejudice in order to get anywhere near
13 to overturning the verdict or really even I think to get
14 into an evidentiary hearing, at least have an allegation
15 of prejudice.

16 Now, defense counsel focused in their
17 cross-examination and in their arguments and of course
18 today and in their pleadings about Junior and the
19 various inconsistencies or I think they even called it
20 lies that they caught him in, but that's losing sight of
21 the evidence at trial.

22 The -- Junior, his credibility was hardly at
23 issue when the jury had the actual recordings of what
24 the -- what the defendants said.

25 THE COURT: I want to -- I disagree with

1 that. I think that his credibility was at issue
2 throughout the whole trial, tape recordings or not,
3 because --

4 MS. MARTINEZ: I don't mean -- I apologize
5 Your Honor. I don't mean it wasn't an issue at trial,
6 but with respect to prejudice, there have to have been
7 actual prejudice shown here. And in light of the weight
8 of the evidence which included recorded statements by
9 the defendants and eyewitnesses who were not Junior --
10 Junior was not an eyewitness to any of these crimes --
11 eyewitnesses who are, of course, cooperating defendants.
12 None of those two things, the recorded statements of the
13 defendants and the co-conspirators and the statement by
14 the cooperating defendant, none of those things have
15 anything to do with Junior's credibility, and that is
16 our argument there. And there is more than sufficient
17 evidence and so we would also submit that defense
18 counsel cannot show prejudice here.

19 THE COURT: All right, thank you.

20 MR. ZIMMERMAN: Just briefly, Judge, two
21 things. One, to be clear, that our motion regarding the
22 Junior immigration benefits is actually more specific.

23 You know, I take the government's point
24 about the A files are thick. On page three of the
25 pleadings, we list five specific things. For example,

1 the first is the green card application and supporting
2 documents.

3 And again, as I made in my -- the opening
4 argument that this is specifically being where Junior
5 has to fill out and it would be critical for us to see
6 whether he puts in the crime.

7 So, you know, again specifically the
8 pleading asked for information bearing on his
9 credibility such as false statements under oath, his
10 bankruptcy hearings, any materials relating to his
11 credibility.

12 So, for the clarity of what we're
13 requesting, it isn't necessarily the entire A file, but
14 these more specific things that would clearly bear on
15 Junior's credibility.

16 Regarding the summaries, you know, I think
17 that --

18 THE COURT: Well, Ms. Austin's covered that.

19 Let me -- I'm sorry. Let me ask you the
20 question about prejudice. Prejudice.

21 MR. ZIMMERMAN: Okay.

22 THE COURT: I'm listening.

23 MR. ZIMMERMAN: The immigration records, and
24 another thing is such as the bankruptcy records, they go
25 to the heart of Junior's credibility which as the Court

1 just noted for the government was critical to the case.

2 And so, you know, if he -- if he -- if this
3 impeached him, that he lied over and over again in these
4 types of records, we think it would be significant
5 prejudice regarding, um, everything about the case. I
6 mean, he's the guy who made the recordings that the
7 government relied on. And if he is simply not credible,
8 um, and if there's serious problems with his credibility
9 we feel could be -- could be reflected in these
10 documents, particularly, his own application and the
11 documents he uses to support that application. That
12 would be significant impeachment. It would be
13 significant impeachment of the government's star
14 witness.

15 I think he was on the stand for 3 or 4 days.
16 He was the heart of the case. And so to suggest that
17 significant impeachment, um, of the star witness of the
18 government wouldn't negligently impact the government's
19 case, to suggest that the ability to do that, um, and
20 the inability to do that and to be hampered in doing
21 that isn't, um, prejudiced to the defendants, I think
22 just doesn't hold up.

23 THE COURT: All right, thank you.

24 MR. ZIMMERMAN: Thank you, Judge.

25 Also, just if I might make one point and

1 this is in rebuttal to something Ms. Martinez said. She
2 suggest that none of the summaries that are done
3 identify any of the defendants. And I would submit
4 that --

5 THE COURT: She said the contract monitors
6 at the time they were taking down the summaries did not
7 know the identity of the person unless the person self
8 identified.

9 MR. ZIMMERMAN: Okay, fair enough. But at
10 some point, they made that connection. Otherwise, all
11 of these recordings are irrelevant. They're -- even the
12 government's investigation, they're just recordings of
13 people we don't know. So at the point --

14 THE COURT: Were the summaries --

15 MR. ZIMMERMAN: I'm sorry, Judge.

16 THE COURT: Were the summaries admitted in
17 evidence?

18 MR. ZIMMERMAN: We've never seen the
19 summaries.

20 THE COURT: So they were never before the
21 jury; is that right?

22 MR. ZIMMERMAN: They weren't, Judge. And
23 were we able to use the summaries to know what we're
24 listening to. So, at some point -- at some point, the
25 conversations are hooked to people. And one of those

1 people on most of the recordings, on a large percentage
2 of the recordings, I think 37 or so for our client is
3 them. And at that point they know it's them.

4 And again, the government has the FBI
5 language department and the Federal Bureau of
6 Investigation at their disposal for this. We don't --
7 we don't know who is on the recordings.

8 And you know we're always in a sticky
9 situation. The defendants are presumed innocent, and
10 many defendants were not in multiple counts.

11 So to say, "well, the defendants must know
12 what the recordings are about", they don't know who was
13 on the recordings. There's recordings that don't
14 involve them but they might exculpatory them.

15 At the point this connection is made, I do
16 think that this is -- it is a contemporaneous recording.
17 They just hooked up the name later as Ms. Austin
18 referred to.

19 Of course they know who is on the
20 recordings. They wouldn't bother doing it otherwise.

21 As for the fact that we get metadata with
22 lots of phone numbers on it, we don't know who the phone
23 numbers are.

24 I mean, I do that in Google reverse search
25 and I get a lot of offers to spend a lot of money which

1 are probably scams about "who is this, find out who this
2 is". You know, we all do that when stuff comes on our
3 cellphones, but we don't know who that is.

4 So it's a lot of data that really doesn't
5 help us when it is, there is just a -- when, you know,
6 if we simply had those, there might be significant
7 exculpatory or impeachment evidence in there in the
8 stuff that wasn't produced.

9 THE COURT: All right.

10 MR. ZIMMERMAN: And we're entitled to those
11 statements.

12 THE COURT: Thank you.

13 MR. ZIMMERMAN: Thank you, Judge.

14 THE COURT: All right. Let's take about a
15 ten-minute recess.

16 (Court recessed at 12:34 p.m. and reconvened
17 at 12:52 p.m.)

18 MR. AMOLSCH: May it please the Court,
19 Christopher Amolsch for Mr. Cerna. Just is a brief
20 idea, Judge.

21 As it relates to Mr. Zimmerman's request
22 regarding Junior's A file, I believe in his motion, he
23 lets out five discreet pieces of information that he's
24 looking for.

25 I'm very sensitive to the Court's questions

1 about prejudice, about how that might have mattered,
2 which against goes back to the difficulty. We don't
3 have it, so we don't know.

4 My suggestion would be to the Court that if
5 you would review that in camera and if you decide that
6 there's anything in those five discreet things that
7 Mr. Zimmerman identifies, and if you think an
8 evidentiary hearing is then appropriate to determine
9 whether there is prejudice to the defense for not having
10 that information, that at that point we could then
11 determine what to do next.

12 But it's obviously difficult for us in the
13 absence of information to make a cogent prejudice
14 argument. That might be a solution for the Court to
15 consider. And again, it's only five things, Judge. It
16 isn't a voluminous amount of information. And then the
17 Court could issue a ruling on that. We could make that
18 part of the record or not as it goes up on appeal.

19 But that was my only thought as it relates
20 to those five specific things Mr. Zimmerman is
21 requesting -- that we're all requesting through
22 Mr. Zimmerman.

23 THE COURT: All right.

24 MR. AMOLSCH: Thank you, Judge.

25 THE COURT: Thank you.

1 All right, counsel. This was a lengthy
2 trial and you all have briefed quite sufficiently your
3 post trial motion.

4 The complexity of them is such that I would
5 not rule from the bench and I would not try to do so.
6 I'll issue written opinions, and I thank you for the
7 quality of your presentation.

8 Thank you. We're in recess. Can you all
9 remain in place and let the government counsel leave,
10 please. If you would all remain in, please. I want the
11 government counsel to leave before you all leave.

12 MS. AUSTIN: Let government counsel leave
13 first. Okay.

14 THE COURT: The reason I'm doing that is
15 because there is ongoing investigation in the case in
16 another matter that involves government counsel, and we
17 rather keep you all separate from her right now. That's
18 fine.

19 Thank you.

20 MS. AUSTIN: Thank you.

21 THE COURT: Not the lawyers, but you know
22 what I'm saying.

23 (Proceedings concluded at 12:56 p.m.)
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CERTIFICATE OF REPORTER

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I, Renecia Wilson, an official court reporter for the United State District Court of Virginia, Alexandria Division, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had upon the motions in the case of United States of America vs. Jose Lopez Torres, et al.

I further certify that I was authorized and did report by stenotype the proceedings and evidence in said motions, and that the foregoing pages, numbered 1 to 80, inclusive, constitute the official transcript of said proceedings as taken from my shorthand notes.

IN WITNESS WHEREOF, I have hereto subscribed my name this 25th day of December, 2016.

/s/

Renecia Wilson, RMR, CRR
Official Court Reporter